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No. 1352

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1967

ROBERT H. FOSDICK
and
GRAHAM P. HUNT, JR.,
Appellants,

v.

HAMILTON COUNTY, OHIO,
Appellee.

On Appeal From the Supreme Court of the State of Ohio

MOTION TO DISMISS APPEAL

May, 17, 1968

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STATEMENT OF THE CASE

This case was brought as a statutory bond validation suit under Ohio Revised Code sections 133.71 - 133.80 (Supp. 1966), whereunder a bond-issuing authority, such as Hamilton County, may seek an adjudication of the validity of bonds authorized but unissued, together with an adjudication of the validity of proceedings taken and proposed to be taken in connection therewith. In its Judgment Entry and Decree, entered on October 13, 1967, the Court of Common Pleas found that Hamilton County had authority to issue $42,250,000 principal amount of Stadium Revenue

Bonds, 1967 Series, for the purpose of constructing a public stadium with related parking facilities, pursuant to a co-operative agreement with the City of Cincinnati under Ohio Revised Code section 153.61 (Supp. 1966), and to secure said bonds with revenue to be received under a proposed lease of the facility to the City of Cincinnati. A copy of the Judgment Entry and Decree appears as Appendix C to appellants' Jurisdictional Statement herein.

This judgment was affirmed per curiam by the First District Court of Appeals on November 20, 1967.

Appellants Hunt and Fosdick appeal from the judgment of the Supreme Court of Ohio dismissing their appeals from the judgment of the First District Court of Appeals. In the Supreme Court of Ohio, the instant case, captioned *Hamilton County, Ohio* v. *Cloud, Auditor of State, et al.*, was consolidated for purposes of argument with *Bazell* v. *City of Cincinnati, et al.*, a taxpayer's suit in which Bazell had sought to enjoin the City of Cincinnati from expending any further funds on a public stadium. The consolidated cases are reported under the name *Bazell* v. *City of Cincinnati*, 13 Ohio St. 2d 63 (1968). No appeal or petition for writ of certiorari has been filed with respect to the judgment in *Bazell*.

Appellee moves the Court to dismiss the appeal herein on the following grounds:

I. APPELLANTS' JURISDICTIONAL STATEMENT DOES NOT CONFORM TO RULE 15 OF THE SUPREME COURT RULES.

Appellants' jurisdictional statement does not comply with Rule 15 in the following particulars, among others:

(A) It does not show the statutory provision believed,

to confer on the Court jurisdiction of the appeal. Sup. Ct. R. 15 (1) (b) (iii).

(B) It does not show cases believed to sustain the jurisdiction. Sup. Ct. R. 15 (1) (b) (iv).

(C) The substance of the questions presented (insofar as may be discovered from the text of the Jurisdictional Statement) is at substantial variance with the questions presented as listed in the notice of appeal, in that appellants now allege for the first time "undue pressure of appellate courts and shortening time ordinarily permitted for appellate work" (Jurisdictional Statement, p. 3) as well as that "enormous sums are taken without due process of law contrary to Amendment XIV Section 1, U. S. Constitution" (Jurisdictional Statement, p. 2). See Sup. Ct. R. 15 (1) (c).

(D) It does not contain a concise statement of the case containing the facts material to the consideration of the questions presented. Sup. Ct. R. 15 (1) (d).

(E) It does not specify the stage in the proceedings in the Court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them; and the way in which they were passed upon by the court; nor does it include any of the other information required by the second sentence of Rule 15 (1) (d).

(F) It does not include a presentation of the grounds upon which it is contended that the federal questions are substantial, nor does it otherwise comply with Rule 15 (1) (e).

(G) The copy of the opinion of the Supreme Court of Ohio appended as "Appendix A" is not a true and complete copy of such opinion, as required by Rule 15 (1) (h), in that the syllabus of such opinion was omitted. The Ohio Supreme Court, except for per curiam opinions, speaks only through the syllabus of the case. See *Beck* v.

Ohio, 379 U.S. 89, 93 & n. 2 (1964); *Perkins* v. *Consol. Min. Co.,* 342 U.S. 437, 441 & n. 3, 442 (1952).

(H) To the extent that it contains elements of the information required by Rule 15, such information is not contained in the order required by Rule 15, but is presented in jumbled and often unintelligible fashion.

II. THE JUDGMENT SOUGHT TO BE REVIEWED RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

The appeals of Messrs. Hunt and Fosdick to the Supreme Court of Ohio were dismissed by reason of their failure to perfect their appeals:

> In the bond validation case, defendants Hunt and Fosdick filed briefs in this court as appellants. Although notices of appeal were filed in the Court of Appeals by those two defendants on December 12, 1967, no copies of those notices were filed by those defendants in this court within 20 days thereafter, as required by Section 1 (A) of Rule I of this court, and hence their appeals are dismissed pursuant to Section 1 of Rule II.
>
> *Bazell* v. *City of Cincinnati* 13 Ohio St. 2d 63, at 75 (1968)

Paragraph 5 of the syllabus of the Supreme Court of Ohio is as follows:

> 5. Where a notice of appeal from a judgment of the Court of Appeals is duly filed in the Court of Appeals but no copy of such notice is filed in the Supreme Court within 20 days after such filing in the Court of Appeals as required by Section 1 (A), Rule I, of the Supreme Court, such appeal will be dismissed pursuant to Section 1 of Rule II.
>
> *Bazell* v. *City of Cincinnati* 13 Ohio St. 2d 63, at 64 (1968)

Thus, neither the Ohio Supreme Court's judgment of dismissal nor the judgment of the First District Court of Appeals on the merits is reviewable by this court. *Newman* v. *Gates*, 204 U.S. 89 (1907); *Chesapeake & Ohio R. Co.* v. *McDonald*, 214 U.S. 191 (1909); *cf. Hammerstein* v. *Superior Court*, 341 U.S. 491, 492 (1951).

III. THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE NOT TIMELY OR PROPERLY RAISED OR EXPRESSLY PASSED UPON.

In the court of first instance (the Court of Common Pleas of Hamilton County, Ohio) the only arguably federal questions raised by either appellant concerned the constitutionality of Ohio Revised Code section 133.80 (Supp. 1966). During a colloquy with the court, appellant Hunt stated that section 133.80 was "unconstitutional" and was "a threat to the taxpayer who comes in here to stand up for his rights and as such is a denial of his day in court and due process of law." Record of July 5, 1967, pp. 20, 21. No specific provision of either the Ohio Constitution or the federal Constitution was mentioned, nor did either appellant indicate to which constitution reference was had.

The Court of Common Pleas, with no indication as to whether it considered the question raised under the state or under the federal constitutions, held this argument to be "without merit." *Hamilton County* v. *Cloud*, 171 O.O. 2d 171, 172-173 (1967).

In the intermediate appellate court (The First District Court of Appeals), appellant Hunt filed a two-page brief in which no claims of unconstitutionality of section 133.80 or any other statute were advanced.

In the Supreme Court of Ohio, appellants filed a joint brief. Under the heading "Questions of Law Presented as Demurrer of Graham P. Hunt, Jr.," section 133.80 was

again characterized as "unconstitutional," without more. Brief for Appellants, p. 6, *Bazell* v. *City of Cincinnati,* 13 Ohio St. 2d 63 (1968). Under the heading "Why Case is of Public and Great General Interest," appellants said that "a constitutional question exists where a taxpayer can be assessed for the entire costs which in this case could be substantial." *Id.* at p. 10. As noted above, the appeals of appellants Hunt and Fosdick were dismissed by reason of their failure to perfect the same; thus, the questions raised in their brief were not passed upon by the Ohio Supreme Court.

Moreover, this Court has held that a mere reference to the "Constitution of the United States" or to the "Constitution and laws of the United States" does not suffice to raise the federal question. *Herndon* v. *Georgia,* 295 U.S. 441, 442-43 (1935); *Harding* v. *Illinois,* 196 U.S. 78, 88 (1904); *Capital City Dairy Co.* v. *Ohio,* 183 U.S. 238, 248 (1902); *Oxley Stave Co.* v. *Butler County,* 166 U.S. 648 (1897). Similarly, reference to "due process of law" will not suffice, at least where the state constitution has a due process clause. *Bowe* v. *Scott,* 233 U.S. 658, 664-65 (1914). Ohio's Constitution provides for "remedy by due course of law," Constitution of Ohio, Art. I, § 16, and this provision has been treated as the equivalent of the Fourteenth Amendment's due process clause. *Adler* v. *Whitbeck,* 44 Ohio St. 539, 569, 9 N.E. 672, 679 (1887); *Salt Creek Valley Turnpike Co.* v. *Parks,* 50 Ohio St. 568, 35 N.E. 304 (1893); *City of Akron* v. *Chapman,* 160 Ohio St. 382, 116 N.E. 2d 697 (1953). Further, if the claim is advanced that a state statute is "unconstitutional" or denies "constitutional rights," it will be assumed that the reference is to the state constitution rather than to the federal Constitution. *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 67-68 (1928). In *New York Central & H. R. Co.* v. *New York,* 186 U.S. 269, 273 (1902), this court held

that "it is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth."

Under these holdings, appellants cannot contend that the federal questions as to which they seek review were either timely or properly raised or expressly passed upon.

IV. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellants do not assert that any portion of the costs incurred below have been taxed against them under Ohio Revised Code Section 133.80 (Supp. 1966) nor against third parties. In fact, all costs below to and including April 16, 1968, as shown on the records of the Clerk of Courts of Hamilton County, Ohio, have been paid by or on behalf of the appellee, and amounted to only $204.05, or barely four per cent of the amount suggested by appellants as a figure which costs "could have easily exceeded." Jurisdictional Statement, p. 4. No further costs below are foreseeable.

Under these circumstances, there is patently no substance in the question appellants have attempted to present.

Respectfully submitted,

FRANK H. SHAFFER, JR.
Counsel for Appellee